

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MARY ANN NEWBERRY

Claimant

VS.

FABPRO ORIENTED POLYMERS, INC.

Respondent

AND

**HARTFORD ACCIDENT & INDEMNITY and
TRAVELERS INSURANCE COMPANY**

Insurance Carriers

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Docket No. 234,839

ORDER

One of respondent's insurance carriers, Hartford Accident & Indemnity, appealed the July 19, 1999 Award entered by Administrative Law Judge Nelsonna Potts Barnes. The Appeals Board heard oral arguments on December 21, 1999.

APPEARANCES

Robert A. Anderson of Ellinwood, Kansas, appeared for the claimant. David L. Vogel of Wichita, Kansas, appeared for the respondent and Hartford Accident & Indemnity (Hartford). Lyndon W. Vix of Wichita, Kansas, appeared for the respondent and Travelers Insurance Company (Travelers).

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

ISSUES

The claimant filed this claim alleging a series of mini-traumas to her hands and arms each and every workday through June 19, 1998. Because of those work-related injuries, claimant underwent left wrist and elbow surgery on June 19, 1998, and right wrist and elbow surgery on October 9, 1998. Hartford's insurance coverage ended on July 31, 1998. Traveler's insurance coverage began on August 1, 1998.

After finding that the appropriate date of accident for claimant's injuries was June 19, 1998, the Judge assessed claimant's award against the respondent and Hartford, which was the insurance carrier on the risk on that date.

Hartford contends that Judge Barnes erred by finding that the appropriate date of accident for the right upper extremity injury was June 19, 1998. Hartford argues that claimant sustained injury to her right hand and elbow until October 9, 1998, when she had surgery on that upper extremity. Therefore, Hartford contends that it should be responsible for the workers compensation benefits related to the left upper extremity only and that Travelers should be responsible for all benefits related to the right upper extremity.

Conversely, Travelers contends that the Award should be affirmed. Travelers argues that June 19, 1998, is the correct date of accident for this repetitive use injury claim. Also, Travelers argues that claimant did not sustain any additional injury to her right upper extremity after she was given accommodated work in May 1998 and, therefore, claimant did not sustain any injury during its coverage period.

Although the issue was not raised before the Judge, in the brief filed with the Appeals Board claimant argued for the first time that she was entitled to receive a "civil interest penalty under K.S.A. 44-512b" because of the insurance carriers' failure to pay benefits for the right upper extremity injury. But at oral argument before the Appeals Board, that argument was abandoned.

The only issue before the Appeals Board on this appeal is what is the appropriate date or dates of accident for claimant's injuries.

FINDINGS OF FACT

After reviewing the entire record, the Appeals Board finds:

1. The parties stipulated that Ms. Newberry sustained repetitive use injuries to both her upper extremities while working for Fabpro Oriented Polymers, Inc. But the parties disagree as to the appropriate date or dates of accident. Hartford contends the date of accident for the left upper extremity should be June 19, 1998, and the date of accident for the right upper extremity should be October 9, 1998. Ms. Newberry contends the date of accident for both upper extremities should be June 19, 1998. Travelers contends the date of accident should be May 14, 1998, when Ms. Newberry was given medical restrictions and provided accommodated work.

2. Ms. Newberry worked for Fabpro Oriented Polymers, Inc. (Fabpro), as a winder operator. That job required repetitive twisting, pulling and lifting with the hands. In December 1997, Ms. Newberry began experiencing numbness and discomfort in both upper extremities. In February 1998, Ms. Newberry saw Dr. Alexander, the company physician. After one or two visits the company doctor referred Ms. Newberry to Dr. Tyrone Artz, an orthopedic surgeon.

3. After reviewing nerve conduction studies, on May 14, 1998, Dr. Artz diagnosed bilateral carpal tunnel syndrome and bilateral ulnar nerve compression at both elbows and recommended surgery. On that date, Dr. Artz also injected Ms. Newberry's wrists with cortisone, gave her night splints, and restricted her from lifting more than 10 pounds and from doing repetitive activities more than one-third of the day.

4. Fabpro then moved Ms. Newberry to different machines to prevent her from doing the same repetitive work for more than a third of the day. Fabpro had an incentive to accommodate Ms. Newberry as the company desired to continue its good record for no lost work time.

5. On June 19, 1998, Dr. Artz performed a carpal tunnel release on Ms. Newberry's left wrist and an ulnar nerve transposition on her left elbow. While recuperating from that surgery, Ms. Newberry's symptoms worsened in the right hand and elbow despite the fact that Fabpro was providing additional accommodations by permitting her to work less hours and giving her work that only required her to monitor a machine.

6. On October 9, 1998, Dr. Artz performed the same surgery on Ms. Newberry's right wrist and elbow.

7. Because of the bilateral carpal tunnel syndrome and the bilateral ulnar nerve compression at the elbows, the parties stipulated that Ms. Newberry has a 17 percent whole body functional impairment.

8. When asked about Ms. Newberry's increased right upper extremity symptoms following the June 1998 surgery on the left wrist and elbow, Dr. Artz stated those increased symptoms were due to a cortisone injection wearing off. The doctor testified:

Q. (Mr. Liby) When you saw her on August 13, 1998, did you expect to see her back in two weeks?

A. (Dr. Artz) I expected to see her back as soon as the cortisone wore off, which I knew it was going to do pretty quickly.

Q. Is it possible that the job activities that she performed between August 1, 1999, or, I am sorry, August 1, 1998, and her visit to you on September 1st, 1998, accelerated the need for her surgery?

A. The acceleration was the fact that the cortisone wore off.

Q. And that occurred after August 1 of '98?

A. Basically the cortisone injection will help for a few weeks. When it wears off, symptoms recur. And that can vary anywhere from a couple weeks to a

month or six weeks. But it is usually a short period of time and it wears off, and the patient comes back and decides they want to have surgery.

Q. If she had not been working at all after August 1, 1998, would you have expected her to come back in the same time frame with the same symptoms?

A. Sure, yes.

Q. So is it possible that the job activities after August 1, '98, accelerated the need for surgery?

A. I doubt that it had any effect.

The Appeals Board finds Dr. Artz's medical opinion uncontroverted and persuasive.

9. Based upon Ms. Newberry's testimony concerning the type of work that she did after June 19, 1998, along with Dr. Artz's testimony, which is the only expert medical opinion in the record, the Appeals Board finds that Ms. Newberry did not sustain additional injury to her right upper extremity following the surgeries on her left arm. Therefore, Ms. Newberry did not sustain additional injury to the right arm after Travelers began providing insurance coverage for Fabpro on August 1, 1998.

10. Dr. Artz released Ms. Newberry to return to work without restrictions as of January 8, 1999. Therefore, Ms. Newberry is seeking permanent partial general disability benefits based upon her 17 percent whole body functional impairment rating.

CONCLUSIONS OF LAW

1. Judge Barnes found that June 19, 1998, was the appropriate date of accident for this claim and the Appeals Board agrees.

2. Where a worker's hands and arms are simultaneously injured, the injury is compensable as one injury to the body rather than two "scheduled" injuries. As the Kansas Supreme Court held in Depew,¹ that is true even in those situations where the symptoms in each upper extremity begin at different times.

3. In Treaster,² the Kansas Supreme Court recently held that the appropriate date of accident for repetitive use injuries (which this is) is the last date that a worker engages in the offending work activity. In Treaster, the Kansas Supreme Court approvingly cited the

¹ Depew v. NCR Engineering & Manufacturing, 263 Kan. 15, 947 P.2d 1 (1997).

² Treaster v. Dillon Companies, Inc., Docket No. 80,830 (Kan. 1999).

Berry³ decision in which the Court of Appeals held that the date of accident for a repetitive trauma injury is the last day worked when the injury is the reason that the worker leaves work.

4. Considering the legal principles of Treaster, Depew, and Berry, the Appeals Board concludes that Ms. Newberry has sustained simultaneous injury to both hands, wrists, and arms, which constitutes an injury to the body, rather than two separate scheduled⁴ injuries. Further, the appropriate date of accident for this claim is the last date that Ms. Newberry worked before her surgery on June 19, 1998 as the evidence establishes that she continued to engage, although to a lesser extent, in "offending activity" through that date. The Judge found that date to be June 19, 1998, and the Appeals Board affirms that conclusion.

5. The Appeals Board specifically rejects Hartford's argument that Ms. Newberry sustained additional injury to her right hand and arm while she was recuperating from the surgery on the left upper extremity because the medical evidence does not support it. Although there is a very strong argument that the date of accident should be May 14, 1998, when Dr. Artz placed Ms. Newberry on certain medical restrictions, which Fabpro accommodated, modifying the award to reflect a May 1998 accident date would not materially affect the amount of benefits due or the parties responsible for payment.

AWARD

WHEREFORE, the Appeals Board affirms the July 19, 1999 Award entered by Judge Barnes.

IT IS SO ORDERED.

Dated this ____ day of January 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

³ Berry v. Boeing Military Airplanes, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994).

⁴ K.S.A. 1997 Supp. 44-510d.

c: Robert A. Anderson, Ellinwood, KS
 David L. Vogel, Wichita, KS
 Lyndon W. Vix, Wichita, KS
 Nelsonna Potts Barnes, Administrative Law Judge
 Philip S. Harness, Director